NO. 87-894

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1987

ARNOLD H. SLYPER
AND
MARCO BAQUERO,
Petitioners,

v.

ATTORNEY GENERAL AND DIRECTOR
UNITED STATES INFORMATION AGENCY,
Respondents.

On Writ of Certiorari
to the
United States
Court of Appeals for the
District of Columbia Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTERESTS OF THE AMICUS CURIAE

The American Immigration Lawyers Association is a nonprofit association of lawyers and law professors practicing and teaching immigration, nationality and citizenship law. The Association is supported by the dues paid by its members and is dedicated to the just administration of the immigration laws of the United States. The Association and its members are committed to the development of the jurisprudence of immigration law. The issues raised by this petition for writ of certiorari directly affect many of the Association's members and their clients. The Association, therefore, submits this brief in support of petitioners. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This Court should exercise its discretion to grant review on writ of certiorari in this case for several reasons. First, the Court of Appeals for the District of Columbia Circuit's decision misapplies this Court's holding in Heckler v. Chaney, 470 US 821, 105 S.Ct 1649, 84 L.Ed. 2d 714 (1985) and conflicts with this Court's landmark decision in Abbott Laboratories v. Gardner, 387 US 136, 87 S.Ct 1507 (1967). The Circuit Court's holding that the United States Information Agency Director's decisions regarding waiver of the two year foreign residency requirement are not subject to judicial review thus raises an issue critical to the field of federal administrative law.

Additionally, the decision of the Court of Appeals for the District of

Columbia Circuit conflicts with this Court's consistent line of desicions insisting on the availability of judicial review of administrative actions except in extremely rare instances where the Government has met the heavy burden of establishing by clear and convincing evidence that Congress intended to preclude judicial review. This conflict results from an unreasonable extension of the presumption of non-reviewabiliy of agency enforcement decisions articulated by this Court in Heckler v. Chaney, supra.

Finally, the decision by the Court of Appeals for the District of Columbia Circuit directly conflicts with the decision in Chong v. Director, United States Information Agency, 821 F.2d 171 (3d Cir. 1987), where the Court of Appeals for the Third Circuit explicitly refused to apply Heckler v. Chaney's presumption

of non-reviewability to the United States Information Agency Director's decisions not to recommend waivers of the two-year foreign residency requirement. Rather, the Court of Appeals for the Third Circuit in Chong applied the traditional strong presumption of reviewability, and, as a result, determined that at a minimum the United States Information Agency's own regulations provided law to apply sufficient to permit judicial review for abuse of discretion.

ARGUMENT

I. Slyper and Baquero's petition for writ of certiorari raises an issue critical to the entire field of federal administrativ law.

The Court below has ruled that decisions by the Director of the United States Information Agency cannot be reviewed for abuse of discretion in the

Courts of the United States. This holding is based on a finding that because the specific statutory section, 8 USC §1182(e), does not provide an explicit list of factors to consider or standards to apply in making decisions to recommend or not recommend waivers of the two-year foreign residency requirement, Congress must have meant to preclude judicial review for abuse of discretion. In fact, the District of Columbia Circuit has found that the mere fact that the statute is drafted so as to vest significant discretion in the Director of the United States Information Agency constitutes "'clear and convincing evidence' of congressional intent to restict judicial review." Slyper v. Attorney General, 827 F.2d 821, 823 (DC Cir. 1987).

By holding that absent "explicit statutory guidelines for the exercise of

discretion", Slyper v. Attorney General, supra. at 823 to 824 (DC Cir. 1987), judicial review pursuant to the Administrative Procedure Act is unavailable, the District of Columbia Circuit appears to reverse the presumption of reviewability and to decline to look beyond the bare words of the statute to find judicially manageable standards. Such an extraordinary holding has far reaching implications for the entire field of federal administrative law. Vast numbers of statutes enabling administrative agencies to act also confer broad discretionary authority on officials enpowered to make a wide variety of decisions. See Hernandez-Cordero v. United States Immigration and Naturalization Service, 819 F.2d 558, 570-574 (5th Cir. 1987) (dissent appending list of statutory sections conferring

broad "in the opinion of" discretionary authority upon the President and other executive officers).

The District of Columbia Circuit, in the decision below has erroneously acted as if the traditional and crucial role of judicial review of agency action were suddenly only appropriate where Congress, by statute has produced an explicit list of factors and standards and specifically directed courts to measure agency action against such a list.

It must be noted that even where broad discretion is vested in an agency, as in the statutory sections referred to above, a challenge to the legal precepts and procedures used by that agency always merits review. In fact, judicial review in such circumstances is essential. As

Professor Kenneth C. Davis has noted,

> a check for abuse of discretion is entirely appropriate where discretion is broad..., because the administrator may be abusing his discretion by violating the statute, by emphasizing facts on one side and ignoring opposing facts, by reacting to emotional and irrelevant considerations, or by otherwise acting unreasonably.

K. Davis 5 Adminstrative Law Treatise, §28:7 at 289 (2d Ed. 1984). Similarly, in a concurring opinion to this Court's decision in Heckler v. Chaney, supra, Justice Marshall stated,

> judicial review is available under the Administrative Procedure Act in the absence of a clear and convincing demonstration that Congress intended to preclude it precisely so that agencies, whether in rule making, adjudicating, acting or failing to act, do not become stagnant back waters of caprice and lawlessness. Heckler v. Chaney, 470 US at 848.

By allowing the opinion of the Court of Appeals for the District of Columbia Circuit to stand unreviewed, this Court would send a chilling message to other courts in the federal system that the long standing presumption of reviewability of administrative action can now be overcome by a mere showing that Congress neglected to make express the factors to be considered and weighed in making certain administrative decisions. Thus, the far reaching and damaging impact of the decision below merits a grant of review on certiorari by this Court.

II. The District of Columbia Circuit's opinion below conflicts with both long standing and recent decisions of this Court regarding the strong presumption of judical review and inappropriatley extends the application of

the holding of this Court in Heckler v. Chaney.

The starting point for any inquiry into the reviewability of adminstrative action must be the strong presumption favoring judicial review that has been repeatedly asserted by this Court. See Abbott Laboratories v. Gardner, 387 US 136, 141, 87 S.Ct 1507, 1511 (1967). This strong presumption was reaffirmed by this Court's seminal opinion in Citizens to Preserve Overton Park v. Volpe, 401 US 402, 91 S.Ct 814 (1971).

Most recently in Bowen v. Michigan Academy of Family Physicians, 476 US __, 106 S.Ct __, 90 L.Ed. 2d 623 (1986), this Court not only reasserted the strong presumption of judicial review of administrative action, but also provided a thoughtful and comprehensive explanation of the importance of this doctrine to

American society. Id. at 90 L.Ed. 2d. 628, 629 (reviewing not only judicial authority for the presumption of reviewability, but also legislative history of the Administrative Procedure Act and the writings of various scholarly commentators). Significantly, this Court commented that the requirement of a showing of clear and convincing evidence that Congress meant to preclude review is a "standard that serves as 'a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling.'" Id. at 629 n3. (quoting Block v. Community Nutrition Institute, 487 US 340, 351 (1984)).

This Court has repeatedly acknowledged the essential role that the judiciary must play in protecting

individuals from agency arbitrariness. Broad grants of discretionary authority alone cannot, under the case law established by this Court, justify finding that agency action is unreviewable. As this Court noted in Bowen v. Michigan Academy of Family Physicians, supra at 629, in order to find that a decision is "committed to agency discretion by law" pursuant to 5 USC §701(a)(2) the inference that Congress intended to preclude abuse of discretion review should be inescapable; there should be no doubt or credible argument to the contrary. In fact, this Court has itself implicitly rejected the argument that the mere presence of broad discretion warrants a finding that judicial review for abuse of discretion is available. INS v. Rios-Pineda, __US__, 105 S.Ct. 2098 (1985) (finding reviewable a discretionary denial

of a motion to reopen deportation proceedings and in so doing, rejecting government's express claim of non-reviewability).

The District of Columbia Circuit's departure from this Court's longstanding insistence on a strong presumption of reviewability seems to be a result of its unwarranted extension of the presumption of unreviewability articulated in this Court's decision in Heckler v. Chaney, supra in the very limited context of agency enforcement decisions.

Both the holding itself and the analysis conducted by this Court in Heckler v. Chaney, by its own terms must be limited to agency decisions not to take enforcement action. First of all, this Court expressly and narrowly created an exception to the traditional strong presumption of reviewability required by

the Overton Park decision. This exception was justified in part by the following language:

> Overton Park did not involve an agency's refusal to take requested enforcement action... this Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce... is a matter generally commited to an agency's absolute discretion. [citations omitted]. Heckler v. Chaney, 470 US at 831.

Additionally, this court cited many factors- that may render agency decisions not to take enforcement action unsuited to judicial review but which simply do not apply to the type of primarily adjudicatory agency action at issue in the instant case. More specifically, this Court noted that agency decisions not to take enforcement action often involve "complicated balancing of a

number of factors which are peculiarly within its expertise", 470 US 821 at 831, such as allocation of resources, availabilty of adequate resources, and likelihood of meaningful and successful results. Moreover, this Court noted a critical practical distinction between agency action such as that in the instant case and an agency decision not to take enforcement action:

> ...When an agency refuses to act it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe on areas that courts are often called upon to protect. Id. at p. 832

Certainly, if the director of the United States Information Agency arbitrarily and capriciously refuses to recommend waivers of the two-year foreign residence

requirement, thereby inflicting predetermined exceptional hardship on United States citizen or permanent resident spouses and children, such action does constitute an exercise of coercive adjudicatory power of the sort that courts are particularly well suited to review.

Despite this Court's effort to limit the scope of its holding in Heckler v. Chaney and to explicitly articulate the narrow issue that decision confronted and decided, Id. at 823, 828, the District of Columbia Circuit has latched onto a single, purely explanatory sentence in this courts Chaney decision and from that has essentially lifted the long standing burden on the Government to show by clear and convincing evidence that Congress meant to preclude judicial review. The finding of no law to apply does not comport with the requirement implicit in

the statute that the Director of the United States Information Agency not act arbitrarily; but rather that he balance the policies of the exchange visitor program against the hardship found by the Immigration Service. As the statutory scheme at 8 USC §1182(e) makes clear, the Director of the United States Information Agency is not even called upon to make a recommendation unless a finding of hardship has first been made. If the USIA director were thus authorized to act as arbitrarily and capriciously as he pleased, the requirement that the Immigration Service make a hardship determination would be superfluous. The only reasonable inference to be drawn from this particular statutory scheme is not that Congress meant to withhold review; but rather, that Congress has implicitly required the United States Information

Agency to balance hardship against such factors as program objectives and to do so in a reasonable, non-arbitrary manner. The United States Information Agency by its own regulations located at 22 CFR §513.32 make these implied guidelines explicit. These factors, hardship to United States citizen relatives and exchange program objectives, can be reviewed by courts for abuse of discretion without reaching beyond the bounds of judicially manageable standards as might possibly be required when a court is determining whether enforcement action ought to have been taken.

This Court in Overton Park made clear that review of an agency decision encompasses review of its ultimate judgment. The scope of this review may be narrow, but courts nevertheless have a responsibility under the Administrative

Procedure Act to determine whether the agency has made a "clear error of judgment". Overton Park, 401 US at 416. Such a determination regarding ultimate judgment can be made without Congress necessarily providing a list of specific factors to consider. Moreover, the District of Columbia Circuit's refusal to recognize that the structure of 8 USC §1182(e) itself provides implicit law to apply in reviewing for abuse of discretion can find no support in a fair reading of this Court's decision in Heckler v. Chaney. The Court in Chaney addressed the tension between 5 USC §701(a)(2) and the broad judicial review provisions of 5 USC §706 and determined that courts generally have no meaningful standard against which to measure agency decisions not to act.

III. Conflict Among the Circuits

The District of Columbia Circuit's decision stands in stark contrast to the decision rendered by the Third Circuit in Chong v. United States Information Agency, supra. Both courts confronted the application of this Court's decision in Heckler v. Chaney to the issue of reviewabilty of USIA decisions not to recommend waivers of the two-year foreign residency requirement. Similarly, a three judge panel of the Second Circuit in Dina v. Attorney General, 793 F.2d 473 (2d Cir. 1986) split two to one over the issue of applying Heckler v. Chaney's reasoning to the issue of reviewability of USIA decisions. In fact, the Third Circuit explicitly notes Judge Oakes' concurring opinion in Dina. Chong v. Director USIA, 821 F.2d. 171, 175 n.3 (agreeing with Judge Oakes that "Heckler v. Chaney does not stand for the proposition that §701(a)(2) precludes judicial review in a

large number of cases. [citations omitted]. Moreover, we believe that Chaney did not change the presumption of reviewability of agency action under the APA. [citations omitted]"). Thus, after carefully analyzing Heckler v. Chaney, supra, in the context of Overton Park, supra, and Abbott Laboratories, supra, the Third Circuit took the correct position that, given the continued vitality of the strong presumption of reviewability of agency action, there must, without any question or doubt, be absolutely no judicially manageable standards against which a court may judge whether or not discretion has been abused.

Under this standard, which comports with the long line of cases of this Court insisting on a strong presumption of reviewability, the Third Circuit found sufficient guidance in the

regulations promulgated by the United States Information Agency itself. These regulations, located at 22 CFR §513.32, instruct the Director of the United States Information Agency to review the policy, program and foreign relations aspects of each case before transmitting a recommendation. The USIA director must consider these factors and balance them against the Immigration Service's finding of extreme hardship to United States citizen or permanent resident children and spouses.

The Third Circuit as well as Judge Oakes in his concurrence in Dina found that the statute and regulations, though broadly drawn, provide sufficient guidance for courts to determine whether a given decision was made in a non-arbitrary and reasoned manner.

The District of Columbia Circuit

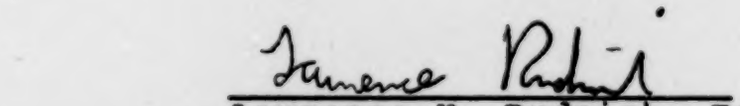
and the majority of the Second Circuit panel have disagreed finding that neither the statute nor the regulations provide sufficient law to apply. Moreover, both courts have found the perceived lack of "law to apply" sufficient to meet the Government's burden of showing by clear and convincing evidence that the Congress meant to preclude judicial review of USIA determinations regarding waivers of the two-year foreign residency requirement.

This condition is an unwarranted limitation of the role of the Courts in the administrative process. The institutional balance reached in Abbott, Overton Park, and Heckler, assigns to the Courts a limited, but real role in reviewing agency action. The decision of the District of Columbia Circuit disturbs that balance in a way which grants unlimited discretion to the USIA and constitutes an improper abdication of judicial responsibility.

CONCLUSION

For the above stated reasons, and pursuant to the guidance provided by this Court's Rule 17.1, this Court should grant review of petitioner's Writ of Certiorari and, upon further briefing, as required, reverse the decision of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,



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